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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1973
NO. 73-355

JOHN O. MAY ..... *Petitioner*

VS.

STATE OF ARKANSAS ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Arkansas Supreme Court is reported at 254 Ark. 194 (Advanced Reports, No. 5) and is reproduced at page 9 of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether Ark. Stat. Ann. §41-303 is constitutional as applied to petitioner and, if so, whether petitioner has standing to challenge the constitutionality of that statute as applied to others?

STATUTE INVOLVED

Ark. Stat. Ann. §41-303 *et seq.* is set forth in the Petition at pp. 16-18.

STATEMENT

The petitioner, a North Little Rock, Arkansas alderman, was convicted of performing an abortion in violation of Ark. Stat. Ann. §41-303 *et seq.*, which statute prohibits the performance of abortions by those not licensed to practice medicine in the State of Arkansas.

The Supreme Court of Arkansas reversed that conviction because of the exclusion of certain evidence but held that the petitioner had no standing to challenge the constitutionality of the statute involved because it was constitutional as applied to him.

ARGUMENT

I.

THE DECISION BELOW IS CLEARLY CORRECT. NONE OF PETITIONER'S CONSTITUTIONAL RIGHTS HAVE BEEN VIOLATED.

Respondent respectfully submits at the outset that the decision in the instant case does not conflict in any way with any decision of this Court. Further, petitioner raises no substantial federal question and thus establishes no basis for the granting of certiorari.

The factual situation is simple. The petitioner is a layman who was convicted of performing an abortion under an Arkansas statute which proscribes the performance of abortions by lay persons. (Ark. Stat. Ann. §§41-303 et seq.) The Supreme Court of Arkansas reversed that conviction because of the exclusion of certain evidence but held with respect to the constitutionality of the statute as applied to petitioner:

> "The appellant has no standing to personally attack the constitutionality of §41-303 because it is not unconstitutional as applied to him. As applied to appellant, §41-303 simply prohibits a layman from performing or inducing an abortion."

Petitioner asserts that this decision of the Arkansas Supreme Court is ". . . contrary to the decision of *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), and *Doe v. Bolton*, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201." However, petitioner fails to indicate the specific nature of any conflict.

In fact *Doe* and *Roe* have made it clear that a state has sufficient interest in the health of its citizenry to require that only licensed physicians perform abortions.

> "The State may define the term 'physician' as it has been employed in the preceding numbered paragraphs of this Part XI of this opinion, to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined." (*Roe, supra*, 410 U.S. at 165).

It could hardly be more obvious that the petitioner, as a lay person, would be prohibited from performing an abortion under any circumstances, even absent whatever portions of the Arkansas Statute he asserts to be unconstitutional.

II.

PETITIONER LACKS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE ARKANSAS ABORTION STATUTES.

Respondent argues that since the Arkansas abortion statute is not unconstitutional as applied to petitioner, the petitioner has no standing to assert possible unconstitutionality with respect to others.

It is clear from a number of federal decisions that in order to have standing to attack the constitutionality of a statute one must, in the absence of extraordinary circumstances, be a member of the class asserted to be aggrieved.

It is likewise clear that:

> ". . . [o]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." (Citations omitted). *United States v. Raines et al.*, 362 U.S. 17, 21, 4 L. Ed. 2d 524, 529 (1960)

Tileston v. Ullman, 318 U.S. 44, 87 L. Ed. 603 (1943) provides a closely analogous situation. That cause found a physician attempting to obtain a declaratory judgment by asserting the rights of three patients in making a constitutional attack on the then existing law in Connecticut with respect to the use or dissemination of contraceptives.

In dismissing the appeal this Court stated:

> "The sole constitutional attack upon the statutes under the Fourteenth Amendment is confined to

> their deprivation of life — obviously not appellant's but his patients' . . . his patients are not parties to this proceeding and there is no basis on which we can say that he has standing to secure an adjudication of his patients' constitutional right to life, which they did not assert in their own behalf." (Citations omitted). (318 U.S. at 46, 87 L. Ed. at 604)

To paraphrase that language, petitioner has no basis here to secure an adjudication with respect to the rights of his victim.

The petitioner cites *State v. Hultgren*, 204 N.W. 2d 197 (Minn. 1973) and several other cases in support of the general proposition that laymen convicted of performing abortions have standing to challenge the constitutionality of State abortion statutes. In *Hultgren* the Supreme Court of Minnesota held that the Minnesota abortion statute was invalid *in its entirety* in the light of the holding in *Roe*, saying:

> "Since §617.18 *makes no distinction* between abortions performed by physicians and those performed by laymen, as presently drafted it is unenforceable against this defendant. . ." (emphasis supplied) (204 N.W. 2d at 198-199).

The Court noted further that:

> ". . . a statute forbidding unlicensed laymen from such activity is not only proper but desirable." (204 N.W. 2d at 198)

The remaining cases cited by petitioner are likewise easily distinguishable from the instant case, and fall into two basic classes.

The first class includes situations similar to that in *Hultgren* where the conviction of a layman was reversed because the State abortion statute failed to distinguish between physicians and laymen and was therefore held invalid *in toto* in the light of *Roe* and *Doe*. *People v. Frey and Mirmelli*, 294 N.E. 2d 257 (Ill. 1973); *People v. Bell*, 294 N.E. 2d 711 (Ill. 1973); *Commonwealth v. Page*, 303 A. 2d 215 (Pa. 1973).

The cases in the second category are concerned with licensed physicians whose actions were found on appeal to be constitutionally protected under the holdings in *Roe* and *Doe*. *State v. Hodgson*, 204 N.W. 2d 199 (Minn. 1973); *State v. Munson*, 206 N.W. 2d 434 (S.D. 1973); *State v. Strance*, 506 P. 2d 1217 (N.M. 1973).

The Court in the *Strance* case held that while the portions of the New Mexico abortion statute which applied to Dr. Strance were unconstitutional in light of *Roe* and *Doe*, this decision would have no effect on the section of the statute which prohibited the performance of abortions by laymen.

Respondent submits that the *Strance* case is the only case cited by petitioner which is helpful to the resolution of the issue before this Court and that the holding there supports the position of respondent.

On the basis of the foregoing, respondent argues that petitioner's reliance on his authority is misplaced and that he has no standing to challenge the constitutionality of the Arkansas abortion statute, which statute is clearly constitutional as applied to petitioner. Further, that the decision below is clearly correct and that no substantial federal question has been raised to establish the basis for the granting of certiorari.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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